



POLICE DEPARTMENT

August 19, 2009

MEMORANDUM FOR: POLICE COMMISSIONER

Re: Police Officer Joseph Marchitelli  
Tax Registry No. 899527  
Bronx Court Section  
Disciplinary Case No. 84071/08  
-----

The above-named member of the Department appeared before me on December 8, 2008, May 8, 2009, and May 11, 2009, charged with the following:

1. Said Police Officer Joseph Marchitelli, while assigned to the 100 Precinct, on or about January 25, 2008, at a location known to this Department, in Queens County, while on duty, did fail and neglect to remain alert, to wit: said officer was observed with his eyes closed in the lounge of the 102 Precinct.

PG 203-10 Page 1, Paragraph 4 – PROHIBITED CONDUCT

2. Said Police Officer Joseph Marchitelli, assigned as indicated in Specification No. 1, on or about January 25, 2008, at a location known to this Department, in Queens County, while on duty, did fail and neglect to notify the Desk Officer from the 100 Precinct that said officer completed his assigned duties in Queens Criminal Court, as required.

PG 203-05 Page 1, Paragraph 1 – PERFORMANCE ON DUTY

3. Said Police Officer Joseph Marchitelli, assigned as indicated in Specification No. 1, on or about January 25, 2008, at a location known to this Department, in Queens County, while on duty, did fail and neglect to notify the Desk Officer from the 102 Precinct that said officer was present in said command, as required.

PG 203-05 Page 1, Paragraph 1 – PERFORMANCE ON DUTY

4. Said Police Officer Joseph Marchitelli, assigned as indicated in Specification No. 1, on or about January 25, 2008, at a location known to this Department, in Queens County, was absent from said assignment without police necessity, to wit: said officer was present inside the 102 Precinct without just cause.

COURTESY • PROFESSIONALISM • RESPECT

PG 203-05 Page 1, Paragraph 2 – PERFORMANCE ON DUTY

5. Said Police Officer Joseph Marchitelli, assigned as indicated in Specification No. 1, on or about January 25, 2008, at a location known to this Department, in Queens County, did fail and neglect to maintain said officer's Activity Log (PD 112-145), as required.

PG 212-08 Page 1, Paragraph 1 – ACTIVITY LOGS

6. Said Police Officer Joseph Marchitelli, assigned as indicated in Specification No. 1, on or about January 25, 2008, at a location known to this Department, in Queens County, while on duty, engaged in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said officer did use his personal vehicle to conduct Department business without prior authorization.

PG 203-10 Page 1, Paragraph 5 – GENERAL REGULATIONS

7. Said Police Officer Joseph Marchitelli, assigned as indicated in Specification No. 1, on or about January 25, 2008, at a location known to this Department, in Queens County, while on duty, did fail and neglect to sign out of Queens Criminal Court, as required.

PG 203-05 Page 1, Paragraph 1 – PERFORMANCE ON DUTY

The Department was represented by Beth Douglas, Esq., Department Advocate's Office, and the Respondent was represented by John Tynan, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Lieutenant Daniel Melore, Sergeant John Patterson, Captain Jason Huerta, and Sergeant Kevin Bischoff as witnesses.

Lieutenant Daniel Melore

Melore has been the Integrity Control Officer (ICO) for the 100 Precinct for the past eleven years. In that capacity, he oversees the daily functions of the command, monitors the overtime and rt appearances, and does patrol observations.

Melore explained that the command received a list every day "of who goes to criminal court, who goes to traffic court." One of Melore's tasks was to check these courts at least once a week.

Melore testified that on January 25, 2009, he was checking the criminal court at approximately 1:00 p.m. He checked the sign-in sheet (see Department Exhibit [DX] 1) for the Respondent. It indicated that the Respondent had first appeared at the Queens Criminal Court building at 8:30 a.m. that day, and had not yet signed out.

At the court, Melore looked around to see if any of his officers were there, then went to see the Assistant District Attorney (ADA). She told him that she had seen the Respondent earlier that day at, she believed, approximately 11:00 a.m. The ADA informed Melore that she had told the Respondent "she didn't really think she was going to need him that day, and he left his cell phone number which occasionally officers will do that. . . . If she needed him, she would give him a call."

Melore told the court that when an officer leaves his cell phone number in a situation like this it is the officer's responsibility to remain in the area of the courthouse.

Melore told the court that after he spoke to the ADA he waited until 2:00 p.m., when the court generally returned from "meal," to see if the Respondent was in the court area. When he didn't see the Respondent in the area he called the 102 Precinct and spoke to the ICO there, Lieutenant Huerta. Melore noted that the courthouse is on Queens Boulevard in Kew Gardens, while the 102 Precinct is on 118th Street, just south of Jamaica Avenue, about two miles from the courthouse.

When asked why he called the 102 Precinct after seeing that the Respondent was not at the courthouse, Melore answered that he had been at a meeting with other ICOs, and the ICO from the 102 Precinct mentioned that the Respondent "has been over at the 102." A sergeant had seen him in the building "a couple of times." Melore testified that the Respondent had been administratively transferred from the 102 Precinct, and "I guess they were concerned after being administratively transferred why he was back at the precinct."

Huerta told Melore that the sergeant (Bischoff, Melore believed) had seen the Respondent around the command at 11:00 a.m. Huerta told Melore to stand by so that he could take a look around the 102 Precinct. At around 2:15 or 2:20 p.m., Huerta called him back and said that he had found the Respondent in the precinct lounge.

In the interim, Melore had called the desk at the 100 Precinct to see if the Respondent had reported back there, but the desk sergeant had not spoken to the Respondent at all.

Melore went to the 102 Precinct and instructed the Respondent to go back to court and officially sign out, and then to meet him at the 100 Precinct. Melore needed to inform the Commanding Officer about what had happened.

Melore testified that the Respondent "had his own car, his private vehicle." Melore stated that Department policy is that if a police officer is going to use his own car, there should be a command log entry to that effect, as well as a notation in the officer's memo book (activity log). Melore testified that according to his investigation, the Respondent never submitted a request for authorization to use his private vehicle.

Melore testified that the court attendance record indicated that the Respondent signed out at 3:28 p.m. He said that an officer assigned to court takes his meal with the court at 1:00 p.m., and is supposed to stay within the vicinity of the court. There are no notifications required when the officer goes on meal because they go at the same time as the court. When asked, "Would an officer document this meal period," Melore said yes, in the memo book.

The Respondent's memo book for the date in question (DX 2) shows no entries between arriving at court and the end-of-tour entry made at 5:20 p.m.

Melore told the Court that unless an officer is out sick or otherwise unfit for duty, he must remain alert at all times while on duty. He further testified that based on his investigation of the matter, the Respondent did not indicate that he was sick at any time on that date.

Melore testified that when they got to the 100 Precinct they went in to see the Commanding Officer, Captain Barrett, who spoke to the borough office about the situation. The borough office said that they would handle the rest of the investigation.

On cross-examination, Melore did not recall how many members were in court that day, but it is generally between one and three. He believed others besides the Respondent were present. He did not know whether he had checked all of their memo books to see if they had been authorized to take private vehicles there. He didn't know how many police vehicles were in service during the second platoon, nor did he know if several officers had grouped together to

take one automobile to the courthouse. Melore did not speak to any other ADA to see if other officers "had fulfilled their obligations" at court. He did, however, check all of the areas where members were assigned to be in to make sure that they were there, and believed that he spoke to other officers.

Melore stated that the ADA told him that she may not have needed the Respondent. She did not say she absolutely didn't need him, rather that she "probably didn't need him." She took his cell phone number when he offered it. Melore believed the Respondent was in court for an arrest he made in the 102 Precinct.

Melore believed that at the time of the incident, the Respondent had been in the 100 Precinct for about five months, and that he had a locker there. Melore did not know if the Respondent still kept any of his paperwork or other police material at the 102 Precinct at that time. If he did he was not supposed to, as it should have been taken with him when he was transferred. According to Melore's estimation, the 102 Precinct is a fifteen to twenty minute walk from the courthouse. Melore opined that it would be an improper use of the Respondent's time to go there to look for paperwork, and that the Respondent should have informed the 100 Precinct desk officer and the supervisor in the court sign-in room that he was leaving the court to go over there. Aside from taking a meal in the vicinity of the court between 1:00 and 2:00 p.m., if officers have to leave the area of the court they must notify a supervisor and tell them why they are leaving because they are assigned to the court for that day.

Melore asserted that as ICO, he may have disciplined one other member for taking a personal automobile on duty. He also told the Court that he had written perhaps six to eight command disciplines (CDs) for officers not being at the courthouse when he went to check on them.

Melore stated that when he arrived at the 102 Precinct, the Respondent was waiting for him outside the building. He did not recall if the Respondent had any paperwork with him. Melore called the ADA to let her know that the Respondent was responding back to his Precinct, and she said that "she hadn't heard from him at all and she didn't need him."

On re-direct examination, Melore was shown the command log and the roll call from the 100 Precinct for the second platoon from January 25, 2008, in order to refresh his recollection as to whether any other officers were scheduled to appear in the criminal court building that day. While the Respondent was the only officer at criminal court, there was one other officer who was on alert for criminal court that day. Two were at traffic court and one was at family court.

On re-cross examination, Melore told the Court that he had not chosen to visit criminal court over family court on that day for any particular reason. He did not recall offhand who was assigned to family court that day, or whether that officer had also been recently administratively transferred to Melore's precinct.

By "administratively transferred," Melore meant that it was not a transfer that the officer requested, but one that the Department chose. It was an intraborough transfer for disciplinary or performance reasons, something beyond simple staffing numbers.

Sergeant John Patterson

Patterson had been assigned as a sergeant in the 100 Precinct for approximately three and a half years. On January 25, 2008, Patterson was working there as the desk officer on the 0655 by 1552 tour.

Patterson was shown the 100 Precinct command log from the date in question (DX 3), and testified that at 7:45 a.m. he changed the Respondent's post to criminal court.

Patterson stated that if the Respondent needed to go to another command "to retrieve arrest information," such information "would . . . have" been reflected in the command log. There was no such reference "indicating Officer Marchitelli needing" to do so.

Patterson testified that Melore called to ask if Patterson had been in contact with the Respondent. He replied that he had not.

Upon cross-examination, Patterson did not recall if Melore told him that he was leaving the precinct to go to criminal court to check on officers, nor did he recall physically seeing Melore on that day.

On re-cross examination, Patterson confirmed that the command log is used to track the location of members of the service when they are within the precinct and are going to do something different from their regular assignments, so that there is a record of what is happening. There is no other log contained or kept at the 100 Precinct to assure a timeline of where members of the service are other than the command log.

Patterson explained to the Court that there are perhaps nine cars available for use by the precinct (excluding the detective squad's cars). He admitted that in general the command did not like to give out cars to members going to criminal court because then the car is just sitting there for the whole day.

#### Captain Jason Huerta

Huerta was the ICO at the 102 Precinct from 2005 to 2008. During that time he was a lieutenant. Huerta knew the Respondent because the Respondent was also assigned to the 102 Precinct during this time. Huerta said that the Respondent was transferred in approximately August 2007 to, he believed, the 100 Precinct.



Huerta testified that on January 25, 2008, he worked a 1200 by 2035 tour. When he went to the command log to sign in, the desk officer, Sergeant Bischoff, informed him that he had seen the Respondent in the vicinity of the station house approximately a half hour before. Huerta did not do anything because he figured that the Respondent was getting gas in the patrol car or was there for some other reason.

Huerta testified that he is familiar with Melore from borough ICO meetings. On the date in question, some time between 12:30 p.m. and 2:00 p.m., Melore called Huerta and asked if he knew where the Respondent "would be if he wasn't in court." Huerta replied that he did not know what the Respondent's "habits were," but repeated what Bischoff told him. Huerta told Melore that they would search the station house for the Respondent.

Huerta stated that he went downstairs to the basement lounge and found the Respondent lying down in the back with the lights off and the door closed. The Respondent was the only person there. He sat up and opened his eyes, at which point Huerta told him to report to the desk and get dressed. The Respondent did not state anything in response at that time. Huerta went upstairs to his office and telephoned Melore, informing him that he had found the Respondent in the lounge. Melore told Huerta that he was on his way to the precinct.

Huerta testified that he made an entry in the 102 Precinct ICO log (DX 5) at 2:15 p.m.: "observed P.O. Marchitelli sleeping on the couch in the lounge. 100 ICO notified and en route. Disciplinary action forthcoming, to be handled by 100 ICO." Huerta was then shown the interrupted patrol log from the 102 Precinct (DX 6). After reviewing it, he testified that there was no entry in it by the Respondent documenting his presence. Huerta testified that an officer entering the station house is supposed to approach the desk officer and explain his presence, at which time the desk officer would make an entry in the interrupted patrol log.

On cross-examination, Huerta was asked if he knew why the Respondent was transferred from the 102 to the 100 Precinct. He responded that it was a result of ongoing allegations of overtime abuse and the result of two command disciplines issued by Huerta himself. Other than the overtime issue, Huerta said that he had never had any problems with the Respondent before the incident in question.

When describing the lounge, Huerta could not recall if there was a loudspeaker in the room, but noted that he did not try to page the Respondent over the loudspeaker system. Huerta said that he waited about ten seconds before he switched the light on.

Huerta was unaware if the Respondent had property and paperwork concerning cases that were still kept at the precinct.

Huerta acknowledged that the Respondent had been transferred approximately five months prior to the incident in question. The transfer request was made based on allegations of overtime abuse made by various members of the District Attorney's Office. Huerta learned about these allegations, which were never proven, from two supervisors who had been desk officer at the time of the alleged incidents. The allegations were essentially that the Respondent was intentionally delaying the arrest process so as to rack up overtime. The DA's office did not want to file formal charges, they just wanted it to stop, and so Huerta counseled the Respondent with that information several times. The borough investigations unit also investigated the overtime abuse allegations. Huerta issued CDs regarding the incidents.

Huerta acknowledged that he was instrumental in the transfer of the Respondent. Huerta knew that the Respondent lived somewhere upstate, but was unsure if it was in [REDACTED]

[REDACTED] The 102 Precinct is in Richmond Hill, Queens, and the 100 Precinct is in the Rockaways, a little further from upstate New York. Huerta estimated that it was approximately

two to four weeks from the time that he contacted the borough in regard to the Respondent's behavior and the time that the Respondent was transferred. Such a decision, however, is made by the Commanding Officer of the precinct, not the ICO. Huerta stated that he had provided the information regarding the arrest overtime to the Commanding Officer.

On re-direct examination, Huerta testified that before the phone call from Melore, he had not been seeking to find any misconduct as to the Respondent, and that he actually liked him.

Sergeant Kevin Bischoff

Bischoff has been assigned as a sergeant at the 102 Precinct since November 30, 2007. On January 25, 2008, he was working there as the desk officer on a 0655 by 1552 tour. Prior to the incident in question, Bischoff had never had any occasion to supervise the Respondent, and had seen the Respondent one time before, getting gas at the 102 Precinct. On January 25, 2008, Bischoff saw the Respondent in the station house, but did not have any conversation with him.

The witness was shown the interrupted patrol log from the 102 Precinct from the date in question (DX 6). There was no indication about an appearance at the precinct by the Respondent because the Respondent had not reported to the desk.

Bischoff told the Court that he had seen Huerta on that day and mentioned to him that he observed the Respondent talking to some other officers. He was prompted to give Huerta this information because either the day before or two days before the incident, Huerta spoke to Bischoff in Huerta's office about the responsibilities of being a newly positioned sergeant. One of those responsibilities is making sure that officers from the midnight shifts "are on top of their paperwork for the arrest for overtime." Huerta mentioned that he had a problem with the

Respondent, who was recently transferred out of the 102 Precinct. He mentioned names of other officers as well.

Bischoff testified that later on in the day on January 25, 2008, Huerta responded to the desk and told him to ensure that the Respondent did not leave the precinct as Huerta "just caught him downstairs sleeping in the lounge." Bischoff did not speak to the Respondent on the date of this incident.

On cross-examination, Bischoff told the Court that on the date of the incident he knew that the Respondent did not work in the 102 Precinct, but that he was not required to ask individuals that aren't assigned to the 102 Precinct to present themselves; they are supposed to report to the desk. Bischoff stated that it did not seem unusual for an officer from another precinct to be there in uniform, and that by the time he looked up again from his paperwork some ten minutes later, the Respondent was gone. When asked, "So in that ten minutes people walked to and from in front of you and you never looked up once," Bischoff replied, "It could happen." Bischoff did not get on the loudspeaker and ask for the Respondent to report to the desk because he figured that he had left.

Bischoff acknowledged that it was his responsibility to maintain security in the precinct, and that his "failure to uphold the administrative log of in the patrol" could have been the basis for demotion to police officer as he was a probationary sergeant at the time.

The Respondent's Case

The Respondent called Police Officer Glen Pyatt as a witness, and testified on his own behalf.

Police Officer Glen Pyatt

Pyatt has been assigned to the 102 Precinct for approximately four to five years, and knew the Respondent from when they both worked there. On January 25, 2008, Pyatt was working at the precinct when he saw the Respondent, whom he knew to be assigned to the 100 Precinct. They had a brief discussion, "regular stuff guys talk about, how his transfer was, how he is doing down there, how is everything going." Pyatt did not remember if Bischoff had interrupted them. The Respondent did not try to pull away from the front desk to where no one could see them; they were in full view of the front desk. Pyatt did not see the Respondent go into a room, go behind a pillar or turn his back on anyone.

The Respondent

The Respondent has been a member of the Department since 1991. [REDACTED]

[REDACTED] He was assigned to the 102 Precinct from 2002 through 2007. In August of 2007 he was transferred to the 100 Precinct, which added an extra twenty minutes each way onto his commute. The Respondent testified that when he was transferred, he left behind "three milk cartons full of files of arrest paperwork."

On January 25, 2008, the Respondent was assigned to the Queens criminal court building to appear in the grand jury. The Respondent started his tour at 7:05 a.m. at the 100 Precinct, and got to the courthouse at about 8:35 a.m. The Respondent testified that about two hours later, he

spoke to the ADA, whose name was Zellner. She said that "there were three other cases ahead of me, she might get to my case that day for me to give her my cell phone number that she wants to go over my paperwork." The Respondent testified that it was a normal occurrence for an ADA to ask him for his cell phone number in order to contact him later during his tour.

Once the Respondent was told that he would not be needed immediately, he went back to the 102 Precinct to get his paperwork. The Respondent acknowledged that he drove his own personal car there.

At the precinct, the Respondent ran into some fellow officers that he had worked with during his time there. For about five to ten minutes he talked to various people in front of the desk. The Respondent was in uniform, and had his shield name plate and collar brass on, and testified that he did not hide the fact that he was there. The Respondent told the Court that he had seen Bischoff once before but that he had never spoken to him. No supervisor asked the Respondent what he was doing there during the time that he was standing in front of the desk.

The Respondent stated that when he finished talking to the other officers he went downstairs to the locker room to look for the paperwork. He stated that he had left the paperwork there because he had a small car and he had no advance notice of his transfer. He had been on vacation, and when he got back to work, he found out about the transfer at roll call. No one contacted him about the transfer over his vacation.

The Respondent testified that after he got the paperwork folder and went to the bathroom, he was going to leave, but then he realized that it was almost one o'clock and he knew that the court would be closed for lunch. The ADA had not called him yet. The Respondent testified that he went into the lounge and was laying down watching TV. He told the Court that this lounge was for resting, as opposed to the other lounge which was for eating. The lights were off.

The Respondent testified that when he entered the lounge, he turned on the TV and changed the channel. No one else was in the lounge. According to the Respondent, he was not asleep at any point.

The Respondent testified that after about an hour Huerta entered. At first Huerta opened the door slightly to look inside, and leaned his head in without stepping all the way into the room. He stayed in that position for a second or two, and then turned the light on. At this point the Respondent sat up.

The Respondent testified that Huerta exclaimed, "what the fuck are you doing here. You are in trouble. Your ICO is looking for you. Go up to my office go up to the desk." The Respondent waited about forty-five minutes before someone from the 100 Precinct arrived.

The Respondent stated that once the ICO from the 100 Precinct (Melo) arrived, he asked what the Respondent was doing there. The Respondent explained that he came back to get paperwork and that the ADA did not call him because the court was out for meal. The Respondent was told to collect all of his paperwork and report to the 100 Precinct. He went downstairs to get the three "buckets" of paperwork and put them in his car. The ICO then brought the Respondent back in and told the desk that he wasn't allowed in the command anymore unless it was for a detail. He told the Respondent to go back to sign out of court, then to drive back to the 100 Precinct.

On cross-examination, the Respondent acknowledged that he had left the 100 Precinct to go to Queens Criminal Court in his own personal vehicle, and had never notified his supervisors that he would be doing so, nor did he make an entry to that effect in his activity log. He did make an entry in the activity log about his appearance in court.

The Respondent denied that he told Zellner, "well, here is my cell number call me if you need me." Nor was it true, the Respondent testified, that Melore told him Zellner had said the Respondent insisted on giving his cell phone number just in case. The Respondent testified that he told Melore that Zellner had said she might need him. He denied that Melore told him that Zellner said she did not need him.

The Respondent agreed that after speaking to Zellner, he did not remain in the courthouse, but stated that he may have spoken to some other people in court before he left, because he has friends there. The Respondent testified that he is familiar with the court attendance record, and that he signed in but did not sign out, in violation of Department procedure. He told the Court that the last time he was there he requested that the sergeant put him in the book and sign him out, and when the sergeant told him not to worry about it, he insisted because of this incident.

The Respondent acknowledged that he went to the 102 Precinct and did not notify the desk sergeant or any other supervisor about his presence inside the precinct. When asked if he did not think it was necessary to go up to the desk officer and make sure that his appearance was noted in the interrupted patrol log, the Respondent explained that, "Well, I didn't think I was going to stay there I thought I was going to get the papers and leave."

The Respondent acknowledged that having retrieved his paperwork he should have gone back to court, but that instead he went into the lounge around one o'clock, his meal period. The Respondent acknowledged that he should have notified the court section that he was taking his meal period, and put it in his memo book. The Respondent denied that he opened his eyes when Huerta walked into the lounge, but acknowledged that he sat up. He said, "I would have shut my eyes because the bright lights when it is dark and the lights go on it is human nature." The



Respondent contended that he was about to go back to court before Huerta prevented him from doing so.

When asked by the Court why it was necessary to go and get this paperwork, the Respondent explained that Zellner wanted to go over the case with him. "She said she wanted my paperwork because we had a trial and grand jury coming up." The Respondent stated that the arrest was for grand larceny of an automobile. He was not sure what exactly the ADA needed, but wanted to make sure that he had the memo book, on line booking report, and photos of the perpetrator.

### FINDINGS AND ANALYSIS

#### Overview

The instant case alleges a failure on the Respondent's part to carry out his job duties appropriately on a single day, January 25, 2008. His assignment during the tour was to appear in Queens court for grand jury testimony. The Respondent's day allegedly ended, however, with his old command's ICO finding him taking a nap in the precinct lounge. The best way to address the several specifications is chronologically, so they will be discussed out of numerical order.

#### Specification No. 6

The sixth specification charges the Respondent with using his personally-owned vehicle to conduct Department business without prior authorization. The Respondent admitted using his own car and that he did not inform any supervisor before doing so. As such, he is found Guilty of Specification 6.

Specification Nos. 7, 2 & 4

The seventh specification charges the Respondent with failing to sign out of Queens Criminal Court after his duties there had ended. It was undisputed that he did not sign out after leaving for the 102 Precinct. The second specification charges that the Respondent failed to notify the desk officer of his command, the 100 Precinct, that he had completed his assignment at court. Patterson, the desk officer, testified that the Respondent never contacted him. Melore testified that he was told by the ADA (Zellner) that she informed the Respondent that she probably would not need him. In turn, the Respondent offered his cell phone number, which she accepted. The Respondent testified that Zellner told him she might not get to his case that day, that he should give her his cell number, and that she wanted to go over his paperwork. The Respondent then left court and traveled to the 102 Precinct to retrieve the paperwork, he contended. As charged in Specification 4, the Department alleged that he had no legitimate reason to be at his old command.

The Court finds that the Respondent was not in the 102 Precinct for just cause, and finds him Guilty of these three specifications. The Court does not credit his explanation for being in the 102 Precinct at all. The Respondent did several things at the 102 Precinct: he talked to his old friends; he failed to announce his presence to the desk officer (see Findings & Analysis, Specification No. 3, infra); and after ostensibly retrieving the paperwork, he did not return to Zellner, reasoning that "I saw the time was almost one o'clock so I knew court was going down for meal." Zellner, like perhaps most daytime office workers, might have gone for lunch around 1:00 p.m., but that does not mean the Respondent had to wait until 2:00 p.m. to give her this paperwork. Moreover, the Respondent asserted that "My ADA didn't call me so I wasn't needed yet." Yet his explanation for going to the 102 Precinct was that Zellner needed paperwork and

wanted to go over it with him. If that were the case, the Respondent should not have been waiting for her to call him – he should have gotten the documents and gone back to court. Instead, he went to the lounge and lay down on the couch in the dark, rising only when Huerta came in and turned on the lights. In fact, he admitted on cross-examination that he should have gone back to court once he retrieved the paperwork. Finally, the Respondent did not call his command and request a post change to the 102 Precinct. All of these actions point to someone who was trying to avoid his duties.

Furthermore, the Court credits Zellner's account of her conversation with the Respondent. While it is a hearsay statement admitted through Melore, Zellner had no motive to lie because she was not being accused of any wrongdoing. If Zellner had been under that impression, it stands to reason that she would have told Melore that she informed the Respondent that, for instance, the case was not going to the grand jury that day, his court duties were completed, and that he could leave. This would have insulated her from any accusation that she somehow allowed the Respondent to commit these infractions. Instead, Melore relayed that Zellner told the Respondent that she "probably" would not need him.

The important thing about Zellner's statement is what she does not mention: that she was missing paperwork necessary for case preparation, and that the Respondent should go and get it for her. If that were really what happened, it was a pretty big detail and there was no reason for Zellner not to mention it. Furthermore, the Respondent could not testify as to what this missing paperwork was. He said that he wanted to make sure he had his memo book, the On Line Booking System Arrest Worksheet (OLBS), and photographs of the defendant. But his answer to the Court's question – what was Zellner missing that she needed you to get? – was that he did not know. The Respondent also testified that after Melore came to the 102 Precinct, the

Respondent took his “three buckets” of paperwork with him. Although the Respondent has no burden of proof at this hearing, it is telling that he did not produce this paperwork in order to show what made it necessary for him to go to his old command.

The Court concludes that Zellner did not ask the Respondent to get paperwork, and that if he went to the 102 Precinct to get paperwork, this was not part of his assigned duties and was rather a pretext to leave court and abandon his assigned duties. As such, the Court finds the Respondent Guilty of Specification 4, being present in the 102 Precinct without just cause. He is also found Guilty of Specification 7, failing to sign out of court when his duties had ended – after speaking to Zellner. Finally, he is found Guilty of Specification 2, failing to notify the desk officer at his command that he had completed his duties at court.

### Specification No. 3

The third specification charges the Respondent with failing to announce his presence at the 102 Precinct to its desk officer, Bischoff. Bischoff testified that he saw the Respondent in the precinct, but he did not report to the desk. The interrupted patrol log, DX 6, showed no reference to an appearance there by the Respondent. Huerta and Bischoff testified credibly that it was the Respondent’s responsibility to explain his presence. The Respondent agreed that he did not go up to the desk officer, stating, “Well, I didn’t think I was going to stay there I thought I was going to get the papers and leave.” Of course, he did not do that; by that reasoning, once he decided to lay down in the lounge, he should have announced his presence. Again, by the Respondent’s reasoning, he was there legitimately, so he had no reason not to announce his presence. Accordingly, the Court finds him Guilty of Specification 3.

Specification No. 1

In the first specification, the Respondent is charged with failing to remain alert, in that Huerta allegedly observed him with his eyes closed in the 102 Precinct lounge.

Huerta testified that he observed the Respondent laying on the couch, in the rear of the lounge, with the lights off. He did not recall if the TV was on. He had the door open perhaps five to ten seconds before turning on the lights, waiting for his eyes to adjust. Huerta said that the Respondent sat up and opened his eyes. Huerta made an entry in the ICO log that he had found the Respondent sleeping in the lounge.

The Respondent testified that he went into the lounge and lay down. He was “fully stretched out.” He testified that he turned the TV on and changed the channel. He testified that he was there for about an hour when Huerta opened the door slightly and looked in. Huerta stayed in this position for a second or two. Then Huerta opened the door more and turned on the lights. At this point, the Respondent sat up. He said that he would have shut his eyes because of the brightness of the lights, but denied that he was sleeping.

Thus, both parties in a sense would agree that the Respondent “was observed with his eyes closed in the lounge of the 102 Precinct.” Of course, the gist of the specification is that the Respondent was taking a nap, and therefore “did fail and neglect to remain alert.” The Court finds that the Department proved by a preponderance of the evidence that the Respondent did, in fact, fail to remain alert, and finds him Guilty of Specification 1.

The Court does not find the Respondent to be a credible witness in this regard. This is not only because as a party he is an interested witness as a matter of law. See People v. Agosto, 73 N.Y.2d 963, 967 (1989); Coleman v. New York City Transit Auth., 37 N.Y.2d 137, 142 (1975). The Respondent was lying down on the couch in a dark room. He gave no explanation

for not turning on the lights to watch TV in the middle of the day. Further, he testified that Huerta opened the door and paused before turning the lights on. Huerta said this pause could have been as long as ten seconds. If the Respondent observed the door open slightly, wide enough and long enough for him to sense that Huerta was looking in, one wonders why he did not sit up, or say something, until Huerta turned the lights on. The answer is that he was not "alert." Therefore the Court finds him Guilty of Specification 1.

#### Specification No. 5

In the fifth specification, the Respondent is charged with failing to maintain his Activity Log, also known as the memo book. As detailed in the Department's opening statement, he is charged with failing to notate his meal period and to refer to his presence in the 102 Precinct. As the memo book (DX 2) shows, no entries were made for these events. The Respondent admitted that he should have listed his meal period (see Patrol Guide § 212-08 [1][a][3]). The Patrol Guide further states that "Absences from post/sector or place of assignment," § 212-08 (c)(3), are to be listed. Accordingly, the Respondent is found Guilty of Specification 5.

#### PENALTY

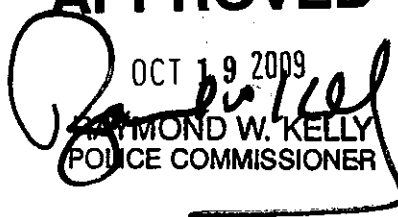
The Respondent has been found Guilty of several specifications arising from one tour. They can be summed as follows: the Respondent left his assignment at Queens court and, without telling any supervisor, went to his old command – one from which he had been transferred amidst allegations of misconduct – talked to some friends, and took a nap. The Respondent's prior disciplinary record, see Confidential Mem., infra, indicates that he consistently has been remiss in attention to mandated rules and procedures. On the other hand,

he has a lengthy and productive record of service to the Department. Accordingly, the Court recommends that the Respondent be DISMISSED from the New York City Police Department, but that his dismissal be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code of the City of New York, during which time he is to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings. The Court further recommends that the Respondent forfeit 30 vacation days. See Disciplinary Case No. 74864/99, signed 2000 (30 vacation days and 1 year probation for officer with several prior disciplinary events: he twice fell asleep on patrol, once resulting in a failure to respond to child-abuse-in-progress call which, fortuitously for him, turned out to be unfounded); Disciplinary Case Nos. 80214/04, 80857/05, 81372/05, & 81620/06, signed 2006 (25 vacation days for, inter alia, leaving hospital room where he was assigned to guard a prisoner, failing to place memo book entries in chronological order, and reading newspaper while at TS desk).

Respectfully submitted,



David S. Weisel  
Assistant Deputy Commissioner – Trials

**APPROVED**  
OCT 19 2009  
  
RAYMOND W. KELLY  
POLICE COMMISSIONER

POLICE DEPARTMENT  
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials  
To: Police Commissioner  
Subject: CONFIDENTIAL MEMORANDUM  
POLICE OFFICER JOSEPH MARCHITELLI  
TAX REGISTRY NO. 899527  
DISCIPLINARY CASE NO. 84071/08

On his last three annual performance evaluations, the Respondent received overall ratings of 4.5 "Extremely Competent/Highly Competent" (2006), 3.0 "Competent" (2007), and 4.0 "Highly Competent" (2008). He has received 15 medals for Excellent Police Duty. [REDACTED]

The Respondent has been the subject of three prior disciplinary adjudications. In 1996, he forfeited 30 suspension days and was placed on one year dismissal probation for failing to take required action when he became involved in an accident with a Department vehicle. In 2000, he forfeited five vacation days for use of excessive force. In 2003, he forfeited 25 vacation days, five pre-trial suspension days, and was again placed on one year dismissal probation for failing to keep a prisoner under constant observation and neglecting to wear his protective vest.

For your consideration.



David S. Weisel  
Assistant Deputy Commissioner – Trials